

## SUBCHAPTER P—CIVIL PENALTIES FOR VIOLATIONS OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

### PART 100—CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT OF CIVIL PENALTIES

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AUTHORITY: 30 U.S.C. 815, 820, and 957.

SOURCE: 47 FR 22294, May 21, 1982, unless otherwise noted.

#### **§ 100.1 Scope and purpose.**

This part sets forth the criteria and procedures for the proposed assessment of civil penalties under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Act). The purpose of this part is to provide a fair and equitable procedure for the application of the statutory criteria in determining proposed penalties for violations, to maximize the incentives for mine operators to prevent and correct hazardous conditions, and to assure the prompt and efficient processing and collection of penalties.

#### **§ 100.2 Applicability.**

The criteria and procedures contained in this part are applicable to all evaluations and proposed assessments of civil penalties for violations of the Act, and the standards and regulations promulgated pursuant to the Act. The Mine Safety and Health Administration (MSHA), United States Department of Labor, shall review each citation and order and shall make proposed assessments of civil penalties.

#### **§ 100.3 Determination of penalty amount; regular assessment.**

(a) *General.* The amount of the civil penalty proposed shall be based upon the formula set forth in this section. The formula is based on the general criteria described in sections 105(b) and 110(i) of the Act. These criteria are:

- (1) The appropriateness of the penalty to the size of the business of the operator charged;
- (2) The operator's history of previous violations;
- (3) Whether the operator was negligent;
- (4) The gravity of the violation;
- (5) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation; and
- (6) The effect of the penalty on the operator's ability to continue in business.

The penalty amount in a regular case shall be determined by first assigning the appropriate number of penalty points to the violation by using the appropriate criteria and tables set forth in this section. The number of penalty points assigned for all criteria will then be totaled, and the point accumulation converted into a dollar amount by using the penalty conversion table in paragraph (g) of this section. Where appropriate, this penalty amount will be adjusted for demonstrated good faith in accordance with § 100.3(f).

(b) *The appropriateness of the penalty to the size of the operator's business.* The appropriateness of the penalty to the size of the production operator's business is calculated by using both the size of the mine cited and the size of the controlling entity of which the mine is a part. This criterion may account for a maximum of 15 penalty points for production operators. The size of an independent contractor will be measured by the amount of hours worked in all mining activities and may account for a maximum of 10 penalty points. The size will be evaluated by selecting the appropriate number of

penalty points from Tables I to V. As used in the Tables below, the terms “annual tonnage” and “annual hours worked” mean tonnage produced and hours worked in the previous calendar year, or, in the case of a mine opened or owned less than one full calendar year, the tonnage and hours worked prorated to an annual basis.

TABLE I—SIZE OF COAL MINE

Annual tonnage of mine	Penalty points
0 to 15,000 .....	0
Over 15,000 to 30,000 .....	1
Over 30,000 to 50,000 .....	2
Over 50,000 to 100,000 .....	3
Over 100,000 to 200,000 .....	4
Over 200,000 to 300,000 .....	5
Over 300,000 to 500,000 .....	6
Over 500,000 to 800,000 .....	7
Over 800,000 to 1.1 million .....	8
Over 1.1 to 2 million .....	9
Over 2 million .....	10

TABLE II—SIZE OF CONTROLLING ENTITY—COAL MINE

Annual tonnage	Penalty points
0 to 100,000 .....	0
Over 100,000 to 700,000 .....	1
Over 700,000 to 1.5 million .....	2
Over 1.5 million to 5 million .....	3
Over 5 million to 10 million .....	4
Over 10 million .....	5

TABLE III—SIZE OF METAL/NONMETAL MINE

Annual hours worked at mine	Penalty points
0 to 10,000 .....	0
Over 10,000 to 20,000 .....	1
Over 20,000 to 30,000 .....	2
Over 30,000 to 60,000 .....	3
Over 60,000 to 100,000 .....	4
Over 100,000 to 200,000 .....	5
Over 200,000 to 300,000 .....	6
Over 300,000 to 500,000 .....	7
Over 500,000 to 700,000 .....	8
Over 700,000 to 1 million .....	9
Over 1 million .....	10

TABLE IV—SIZE OF CONTROLLING ENTITY—METAL/NONMETAL MINE

Annual hours worked	Penalty points
0 to 60,000 .....	0
Over 60,000 to 400,000 .....	1
Over 400,000 to 900,000 .....	2
Over 900,000 to 3 million .....	3
Over 3 million to 6 million .....	4
Over 6 million .....	5

TABLE V—SIZE OF INDEPENDENT CONTRACTOR

Annual hours worked at all mines	Penalty points
0 to 10,000 .....	0
Over 10,000 to 20,000 .....	1
Over 20,000 to 30,000 .....	2
Over 30,000 to 60,000 .....	3
Over 60,000 to 100,000 .....	4
Over 100,000 to 200,000 .....	5
Over 200,000 to 300,000 .....	6
Over 300,000 to 500,000 .....	7
Over 500,000 to 700,000 .....	8
Over 700,000 to 1 million .....	9
Over 1 million .....	10

(c) *History of previous violations.* Over-all history is based on the number of assessed violations in a preceding 24-month period. Only violations that have been paid or finally adjudicated will be included in determining history. The history of previous violations may account for a maximum of 20 penalty points. For mine operators, the penalty points will be calculated on the basis of the average number of assessed violations per inspection day (VPID) (Table VI). For independent contractors, penalty points will be calculated on the basis of the average number of violations assessed per year at all mines (Table VII).

TABLE VI—MINE OPERATORS

Violations per inspection day	Penalty points
0 to 0.3 .....	0
Over 0.3 to 0.5 .....	2
Over 0.5 to 0.7 .....	4
Over 0.7 to 0.9 .....	6
Over 0.9 to 1.1 .....	8
Over 1.1 to 1.3 .....	10
Over 1.3 to 1.5 .....	12
Over 1.5 to 1.7 .....	14
Over 1.7 to 1.9 .....	16
Over 1.9 to 2.1 .....	18
Over 2.1 .....	20

TABLE VII—INDEPENDENT CONTRACTORS

Number of violations	Penalty points
1 to 5 .....	0
6 to 10 .....	2
11 to 15 .....	4
16 to 20 .....	6
21 to 25 .....	8
26 to 30 .....	10
31 to 35 .....	12
36 to 40 .....	14
41 to 45 .....	16
46 to 50 .....	18
Over 50 .....	20

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(d) *Negligence.* Negligence is committed or omitted conduct which falls below a standard of care established under the Act to protect persons against the risks of harm. The standard of care established under the Act is that the operator of a mine owes a high degree of care to the miners. A mine operator is required to be on the alert for conditions and hazards in the mine which affect the safety or health of the employees and to take the steps necessary to correct or prevent such conditions or practices. For purposes of assessing a penalty under this part, failure to do so is negligence on the part of the operator. The negligence criterion gives appropriate consideration to the factors relating to an operator's failure to exercise a high degree of care to protect miners from safety or health hazards. When applying this criterion, MSHA considers actions taken by the operator to prevent or correct conditions or practices which caused or allowed the violation to exist. In determining the operator's diligence in protecting miners in any given hazard situation, due recognition is given to mitigating circumstances which explain the operator's conduct in minimizing or eliminating a hazardous condition. Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards. This criterion may contribute a maximum of 25 penalty points, based on conduct evaluated according to Table VIII.

TABLE VIII—NEGLIGENCE

Categories	Penalty points
No negligence ..... (The operator exercised diligence and could not have known of the violative condition or practice.)	0
Low negligence ..... (The operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.)	10
Moderate negligence ..... (The operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.)	15
High negligence ..... (The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.)	20
Reckless disregard .....	25

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TABLE VIII—NEGLIGENCE—Continued

Categories	Penalty points
(The operator displayed conduct which exhibits the absence of the slightest degree of care.)	

(e) *Gravity.* Gravity is an evaluation of the seriousness of the violation as measured by the likelihood of the occurrence of the event against which a standard is directed, the severity of the illness or injury if the event occurred or were to occur, and the number of persons potentially affected if the event occurred or were to occur. This criterion may contribute a maximum of 30 penalty points, with up to 10 points derived from each of the following tables (Tables IX to XI):

TABLE IX—LIKELIHOOD

Likelihood of occurrence	Penalty points
No likelihood .....	0
Unlikely .....	2
Reasonably likely .....	5
Highly likely .....	7
Occurred .....	10

TABLE X—SEVERITY

Severity of injury or illness if the event occurred or were to occur	Penalty points
No lost work days ..... (All occupational injuries and illnesses as defined in 30 CFR part 50 except those listed below.)	0
Lost work days or restricted duty ..... (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)	3
Permanently disabling ..... (Any injury or illness which would be likely to result in the total or partial loss of the use of any member or function of the body.)	7
Fatal ..... (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	10

TABLE XI—PERSONS POTENTIALLY AFFECTED

Number of persons potentially affected if the event occurred or were to occur	Penalty points
0 .....	0
1 .....	1
2 .....	2
3 .....	4
4 to 5 .....	6
6 to 9 .....	8
More than 9 .....	10

(f) *Demonstrated good faith of the operator in abating the violation.* This criterion provides a 30% reduction in the penalty amount of a regular assessment where the operator abates the violation in the time set by the inspector. Where the operator does not abate within the time set by the inspector, 10 penalty points will be assigned.

(g) *Penalty conversion table.* The following penalty conversion table shall be used to convert the accumulation of penalty points to the appropriate proposed monetary assessment.

PENALTY CONVERSION TABLE

Points	Penalty
20 or fewer .....	60
21 .....	66
22 .....	72
23 .....	78
24 .....	84
25 .....	90
26 .....	99
27 .....	108
28 .....	117
29 .....	126
30 .....	135
31 .....	147
32 .....	159
33 .....	171
34 .....	183
35 .....	195
36 .....	210
37 .....	225
38 .....	240
39 .....	255
40 .....	270
41 .....	292
42 .....	315
43 .....	337
44 .....	360
45 .....	382
46 .....	412
47 .....	442
48 .....	518
49 .....	617
50 .....	724
51 .....	851
52 .....	987
53 .....	1,134
54 .....	1,290
55 .....	1,457
56 .....	1,650
57 .....	1,855
58 .....	2,072
59 .....	2,301
60 .....	2,542
61 .....	2,816
62 .....	3,105
63 .....	3,407
64 .....	3,724
65 .....	4,000
66 .....	4,200
67 .....	4,400
68 .....	4,600
69 .....	4,800
70 .....	5,000
71 .....	5,250
72 .....	5,500

PENALTY CONVERSION TABLE—Continued

Points	Penalty
73 .....	5,750
74 .....	6,000
75 .....	6,250
76 .....	6,500
77 .....	7,000
78 .....	7,500
79 .....	8,000
80 .....	8,500
81 .....	9,500
82 .....	10,500
83 .....	11,500
84 .....	12,500
85 .....	13,500
86 .....	15,000
87 .....	17,000
88 .....	19,000
89 .....	21,000
90 .....	23,000
91 .....	25,000
92 .....	27,500
93 .....	30,000
94 .....	32,500
95 .....	35,000
96 .....	37,500
97 .....	40,000
98 .....	42,500
99 .....	45,000
100 .....	50,000

(h) *The effect on the operator's ability to continue in business.* It is initially presumed that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. The operator may submit information to the District Manager concerning the business financial status to show that payment of the penalty will affect the operator's ability to continue in business. If the information provided by the operator indicates that the penalty will adversely affect the ability to continue in business the penalty may be adjusted.

[47 FR 22294, May 21, 1982, as amended at 57 FR 2970, Jan. 24, 1992; 57 FR 60697, Dec. 21, 1992]

#### § 100.4 Determination of penalty; single penalty assessment.

(a) An assessment of \$50 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness (non-S&S) and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the \$50 single penalty and will be processed through either the regular assessment provision (§ 100.3) or special assessment provision

(§100.5). If the violation meets the criteria for excessive history under §100.4(b), the violation will not be eligible for the \$50 single penalty and will be processed through the regular assessment provision (§100.3).

(b) Excessive history shall be based on overall history from paragraph (c) of §100.3. Excessive history is defined as 20 penalty points for overall history. Mines having 10 or fewer assessed violations in a preceding 24-month period will be excluded from any excessive history determination. Only violations that are paid or finally adjudicated will be included in determining excessive history. Only citations and orders issued on or after January 1, 1991, shall be considered in determining excessive history.

[57 FR 60697, Dec. 21, 1992; 57 FR 61612, Dec. 28, 1992]

**§100.5 Determination of penalty; special assessment.**

MSHA may elect to waive the regular assessment formula (§100.3) or the single assessment provision (§100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment. Although an effective penalty can generally be derived by using the regular assessment formula and the single assessment provision, some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under these provisions. Accordingly, the following categories will be individually reviewed to determine whether a special assessment is appropriate:

- (a) Violations involving fatalities and serious injuries;
- (b) Unwarrantable failure to comply with mandatory health and safety standards;
- (c) Operation of a mine in the face of a closure order;
- (d) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;
- (e) Violations for which individuals are personally liable under section 110(c) of the Act;
- (f) Violations involving an imminent danger;
- (g) Discrimination violations under section 105(c) of the Act; and

(h) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.

When MSHA determines that a special assessment is appropriate, such special assessment shall take into account the criteria enumerated in §100.3(a) and §100.4(b). All findings shall be in narrative form.

[47 FR 22294, May 21, 1992, as amended at 57 FR 60697, Dec. 21, 1992]

**§100.6 Procedures for review of citations and orders; procedures for assessment of civil penalties and conferences.**

(a) All parties shall be afforded the opportunity to review with MSHA each citation and order issued during an inspection.

(b) Upon notice by MSHA, all parties shall have 10 days within which to submit additional information or request a safety and health conference with the District Manager or designee. A conference request may include a request to be notified of, and to participate in, a conference initiated by another party.

(c) It is within the sole discretion of MSHA to grant a request for a conference and to determine the nature of the conference.

(d) When a conference is conducted, the parties may submit any additional relevant information relating to the violation, either prior to or at the conference. To expedite the conference, the official assigned to the case may contact the parties to discuss the issues involved prior to the conference.

(e) MSHA will consider all relevant information submitted in a timely manner by the parties with respect to the violation. When the facts warrant a finding that no violation occurred, the citation or order will be vacated.

(f) All citations which have been abated and all orders will be promptly referred by the District Manager to the Office of Assessments.

(g) The Office of Assessments will use the citations, orders, and inspector's evaluation as the basis for determining the appropriate amount of a proposed penalty.

**§ 100.7 Notice of proposed penalty; notice of contest.**

(a) A notice of proposed penalty will be issued and served by certified mail upon the party to be charged and by regular mail to the representative of miners at the mine after the time permitted to request a conference under § 100.6 expires, or upon the completion of a conference, or upon review by MSHA of additional information submitted in a timely manner.

(b) Upon receipt of the notice of proposed penalty, the party charged shall have 30 days to: (1) Pay the proposed assessment (acceptance by MSHA of payment tendered by the party charged will close the case); or, (2) notify MSHA in writing of the intention to contest the proposed penalty. The Office of Assessments shall provide a return mailing card with each notice of proposed penalty to be used by the party charged to request a hearing before the Federal Mine Safety and Health Review Commission under section 105 of the Act. Such a request must be sent to the address listed on such notification. When MSHA receives the notice of contest, it shall immediately advise the Commission of such notice, and shall promptly forward the case to the Office of the Solicitor. No proposed penalty which has been contested before the Commission, shall be compromised, mitigated or settled ex-

cept with the approval of the Commission.

(c) The failure to pay or to contest the proposed penalty within 30 days of receipt of notice thereof shall result in the proposed penalty being deemed a final order of the Commission and not subject to review by any court or agency.

**§ 100.8 Service.**

(a) All operators are required by 30 CFR part 41 (Notification of Legal Identity) to file with MSHA the name and address of record of the operator. All representatives of miners are required by 30 CFR part 40 (Representative of Miners) to file with MSHA the mailing address of the person or organization acting in a representative capacity. Proposed penalty assessments delivered to those addresses shall constitute service.

(b) If any of the parties choose to have proposed penalty assessments mailed to a different address, the Office of Assessments must be notified in writing of the new address. Delivery to this address shall also constitute service.

(c) Service for operators who fail to file under 30 CFR part 41 will be upon the last known business address recorded with MSHA.

**PARTS 101-103—[RESERVED]**